IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CONSERVATION LAW FOUNDATION, INC.,	)	
Plaintiff,	)	
v.	)	Case 1:16-cv-11950 (MLW)
EXXON MOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, and EXXONMOBIL PIPELINE COMPANY,	)	
Defendants.	)	

REPLY OF DEFENDANTS TO MEMORANDUM OF PLAINTIFF
IN RESPONSE TO THE COURT'S ORDER OF OCTOBER 6, 2021

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Recent developments have further imperiled CLF's lawsuit. A pair of decisions the Supreme Court issued last term demonstrate that CLF lacks Article III standing to pursue its core claims. Recent amendments to the Terminal's SWPPP have mooted most of the bases for CLF's request for injunctive relief. And recent administrative proceedings demonstrate that EPA disagrees with CLF's interpretation of the most important permit term in the case.

CLF's supplemental brief makes little headway in resuscitating its claims. CLF offers only a weak substantive response to ExxonMobil's arguments on Article III standing, instead seeking to shield itself behind nonexistent procedural barriers. CLF's argument on mootness fares no better. Its claim that the revised SWPPP affects only two paragraphs of its amended complaint is demonstrably false. Nor is CLF's position on the 2021 MSGP tenable in light of EPA's now-publicly expressed and unambiguous construction of the key disputed provision in the permit. EPA's responses to CLF's comments clearly show that EPA disagrees with CLF's interpretation of the "good engineering practices" requirement, and consideration of those administrative documents is entirely proper at this stage of the case.

CLF's claims thus fail for multiple independent reasons. CLF lacks standing to pursue its SWPPP and RCRA claims; its SWPPP claims are moot; and the SWPPP claims fail on the merits as a matter of law. Counts 6–15 of the amended complaint therefore should be dismissed. If those claims proceed, the Court should reject CLF's inordinately truncated discovery schedule and adopt the discovery plan proposed by ExxonMobil.

I. Recent Supreme Court Authority Demonstrates that CLF Lacks Standing to Pursue Its SWPPP and RCRA Claims

The Supreme Court's recent decisions in *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190 (2021), and *California* v. *Texas*, 141 S. Ct. 2104 (2021), together show that CLF lacks Article III standing to pursue its SWPPP and RCRA claims. *See* ExxonMobil Supp. Br. 7–15, ECF No. 123.

CLF fails to grapple meaningfully with the implications of those cases, instead attempting to avoid them altogether. *See* CLF Supp. Br. 13–18, ECF No. 124. CLF's efforts are unsuccessful.

CLF primarily argues (Br. 14–18) that the Court should not address ExxonMobil's standing arguments because ExxonMobil purportedly cannot satisfy the standard for obtaining reconsideration of the Court's previous ruling on standing. That argument lacks merit. As ExxonMobil explained in its opening brief (at 16), questions of subject-matter jurisdiction can be raised at any time. *See Hochendoner* v. *Genzyme Corp.*, 823 F.3d 724, 730 (1st Cir. 2016); Fed. R. Civ. P. 12(c) & (h)(3). For those reasons, a district court's otherwise broad discretion about whether to reconsider interlocutory orders "is narrowed in the context of motions to reconsider issues going to the court's Article III subject matter jurisdiction." *Am. Canoe Ass'n* v. *Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003).

In any event, *TransUnion* and *California* constitute intervening changes in the law and thus would justify reconsideration under any applicable standard. *But see* ExxonMobil Supp. Br. 17 (noting that the standard under Fed. R. Civ. P. 59(e) is not binding on motions to reconsider interlocutory orders). In *TransUnion*, the Supreme Court held for the first time that the mere risk of future harm does not provide Article III standing to seek retrospective damages. *See* 141 S. Ct. at 2210–11. And it clarified that, absent a serious likelihood of occurrence, a risk of future harm is too speculative to create standing even to seek prospective relief. *See id.* at 2211–12. In *California*, the Supreme Court clarified that a plaintiff cannot obtain prospective relief for a future risk of harm that is not traceable to *the particular legal violation alleged*. *See* 141 S. Ct. at 2116. Those holdings clarified the law sufficiently to "cast into doubt" the Court's prior ruling on CLF's standing. *United States* v. *Holloway*, 630 F.3d 252, 258 (1st Cir. 2011).

CLF also argues (Br. 15–16) that *TransUnion* and *California* are factually distinguishable from this case. That is true as far as it goes, but it does not go far. Regardless of the facts at issue, those decisions establish broad legal principles that apply to all cases in federal court. *See* ExxonMobil Supp. Br. 2–3 (listing the relevant principles).

Those principles demonstrate that CLF faces at least two defects in its Article III standing to seek prospective relief on its SWPPP and RCRA claims. The first is that CLF's alleged risk of harm from future flooding at the Everett Terminal is far too speculative to confer standing. *See* ExxonMobil Supp. Br. 7–10. If, in *TransUnion*, there was no "serious likelihood" of the risk that a consumer's erroneous credit report could be disseminated imminently, *see* 141 S. Ct. at 2112, then there certainly is no serious likelihood that (i) a severe weather event will flood the Terminal in the near future, (ii) the flooding will result in the failure of some structure at the Terminal, (iii) the Terminal's control measures will prove inadequate to address the failure, *and* (iv) an unpermitted discharge of pollutants affecting CLF or one of its members will occur. *See, e.g.*, Am. Compl. ¶ 14, ECF No. 34. CLF's theory of future harm is far more remote, attenuated, and speculative than that at issue in *TransUnion*. Indeed, CLF has alleged no facts indicating a serious likelihood that severe precipitation or flooding will imminently exceed the design capacity of the Terminal's permitted stormwater treatment system and cause such unpermitted discharges. *See* ExxonMobil Supp. Br. 8–10.

CLF's second standing defect with respect to injunctive relief is that it alleges bare procedural violations of the Clean Water Act, and it cannot trace those alleged procedural violations to the asserted risk of future harm. *See* ExxonMobil Supp. Br. 10–14. CLF's SWPPP-related claims fault ExxonMobil for failing to prepare a written document in a certain manner and for failing to submit certain data to EPA. But CLF has not alleged any separate concrete injury

attributable to those harms. Nor has it alleged facts showing that the alleged deficiencies in the SWPPP "will cause the injury [it] attribute[s]" to those deficiencies. *California*, 141 S. Ct. at 2214. In other words, the amended complaint does not explain how those alleged deficiencies *themselves* would create any risk of harm from flooding at the Terminal (if such a risk there were); any such risk would necessarily depend on factors external to the SWPPP, which is merely a regulatory document. CLF thus cannot trace its alleged risk of harm to the procedural violations it alleges.

CLF separately argues (Br. 16–17) that it can still seek civil penalties. That is incorrect. The Supreme Court held in *TransUnion* that a party cannot seek retrospective money damages based on a harm that has not materialized. *See* 141 S. Ct. at 2110–11. That holding applies with equal force to civil penalties, which are also "necessarily retrospective" in nature. *United States* v. *EME Homer City Generation, L.P.*, 727 F.3d 274, 292 n.20 (3d Cir. 2013); *accord Maine* v. *Dep't of Navy*, 973 F.2d 1007, 1011 (1st Cir. 1992).

CLF responds that, even if *TransUnion* "applied to CLF's claims for civil penalties," those claims would fall within an "exception" recognized in *TransUnion* for circumstances in which "the exposure to the risk of future harm itself causes a separate concrete harm." Br. 17 (quoting *TransUnion*, 141 S. Ct. at 2211–12). CLF contends that the exception is satisfied here because "the risk of future harm detrimentally impacted [its members'] use and enjoyment of local waterways." Br. 17. But in their declarations in support of CLF's standing, CLF's members primarily asserted that they feared for their safety *in the event there is a future discharge due to flooding*. *See, e.g.*, ECF No. 21-1, ¶¶ 13–14; ECF No. 21-2, ¶¶ 12–13; ECF No. 21-3, ¶¶ 12–15; ECF No. 21-4, ¶¶ 11–16; ECF No. 21-5, ¶¶ 9–11. Such bare assertions of stress, anxiety, and "conjectural fear" about the possibility of future harm do not demonstrate a present concrete injury. *See Reddy* v. *Foster*, 845 F.3d 493, 503 (1st Cir. 2017); *Wadsworth* v. *Kross, Lieberman & Stone*,

Inc., 12 F.4th 665, 668 (7th Cir. 2021); *Garland* v. *Orlans, PC*, 999 F.3d 432, 439 (6th Cir. 2021); *Heglund* v. *Aitkin County*, 871 F.3d 572, 577 (8th Cir. 2017). To the extent that CLF's members claim to suffer a diminished ability to "enjoy the Mystic River" from mere "know[ledge]" of an alleged increased risk of future flooding, *e.g.*, ECF No. 21-5, ¶ 10, that is little more than a "sense of indignation" that future harm could occur, which is "not enough for standing." *Gunn* v. *Thrasher, Buschmann & Voelkel, P.C.*, 982 F.3d 1069, 1071 (7th Cir. 2020) (discussing *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982)). The *TransUnion* exception does not apply.

Finally on this score, CLF states in a footnote that "due process dictates the appropriate time to readdress [the standing] inquiry is at the summary judgment stage after the case has gone through discovery." Br. 17 n.5. Even if CLF had not forfeited that unusual argument by raising it only in a footnote unsupported by argumentation, *see Janssen Biotech, Inc.* v. *Celltrion Healthcare Co.*, Civ. No. 17-11008, 2018 WL 10910845, at *25 (D. Mass. July 30, 2018), *aff'd*, 796 F. App'x 741 (Fed. Cir. 2020), it fails on the merits. CLF has always been on notice that the Court can consider the question of standing at any point in the litigation. *See* Fed. R. Civ. P. 12(h)(3).

II. CLF's SWPPP Claims Are Moot

In response to EPA's promulgation of the 2021 MSGP and its inclusion of the new Part 2.1.1.8, ExxonMobil significantly revised the Terminal's SWPPP, as required by the Terminal's permit, from the version in effect when CLF filed the amended complaint. The amended complaint now challenges an inoperative SWPPP, and the revised SWPPP clearly considers the increased risk of major storm events due to climate change, as CLF argues is required. CLF's SWPPP claims are therefore moot. *See* ExxonMobil Supp. Br. 18–24. CLF offers a variety of responses, but each is unpersuasive.

CLF argues that "[n]one of the changes in the 2021 SWPPP are material to CLF's claims," contending that the changes undermine only two paragraphs in the amended complaint. Br. 6; *see* Br. 9. That statement is simply unsupportable. The amended complaint alleges, for example, that the SWPPP "fail[s] to include information documenting, or plans to address, pollutant discharges associated with" flood risks from extreme weather events (Count 6, Am. Compl. ¶ 266); that ExxonMobil did not prepare the SWPPP in accordance with "good engineering practices" because it purportedly did not consider risks from heavy precipitation and flooding (Count 7, *id.* ¶ 272); that the SWPPP "fail[s] to identify sources of pollution," resulting from heavy precipitation and flooding (Count 8, *id.* ¶ 280); that ExxonMobil failed to "amend[] or update[] its SWPPP based on information regarding" risks from heavy precipitation and flooding (Count 13, *id.* ¶ 323); and that ExxonMobil improperly certified the SWPPP to EPA without "disclos[ing] and consider[ing]" risks from heavy precipitation and flooding (Count 14, *id.* ¶ 340). Those core allegations, and many others, are demonstrably false if applied to the revised SWPPP. The revised SWPPP, amended to address EPA's new 2021 requirements, contains numerous express provisions addressing risks presented by major storm events. *See* 2021 SWPPP §§ 2.2, 2.4, 3.0, 3.1, 3.2, 3.4, 3.9, 3.11, at 14 n.**, 16–20, 22, 23, 24, 26–27, 31–32, 38, ECF No. 125-1; ExxonMobil Br. 20–22.

CLF is thus incorrect when it claims that "[n]othing in the 2021 SWPPP addresses Exxon's foundational failure[] to analyze the risk posed to the Terminal by foreseeable severe weather." Br. 13. The revised SWPPP demonstrates that ExxonMobil analyzed the Terminal's stormwater treatment system in light of those very risks, thus mooting CLF's claim for injunctive relief. And while CLF notes that its "demand for civil penalties would remain" live "even if the 2021 SWPPP eliminated the need for some of CLF's requested injunctive relief," Br. 12, the problem with CLF's

request for civil penalties at this juncture is not mootness but standing. *See* pp. 4–5, *supra*; ExxonMobil Supp. Br. 14–15.

CLF next argues (Br. 7) that the revised SWPPP is insufficient because its reliance on FEMA maps to assess precipitation frequency is "misplaced." But the 2021 MSGP provides that, "[t]o determine if your facility is susceptible to an increased frequency of major storm events that could impact the discharge of pollutants in stormwater, you may reference FEMA, NOAA, *or* USGS flood map products." 2021 MSGP pt. 2.1.1.8, at 18 n.6, ECF No. 125-2 (emphasis added). EPA thus views the FEMA maps as sufficient, and ExxonMobil went even further by relying on the most current NOAA estimate as of February 2021 for precipitation frequency of a 10-year, 24-hour storm. *See* Revised SWPPP § 3.0, at 18.

According to CLF (Br. 7), the Court already held on ExxonMobil's motion to dismiss that compliance with the 10-year 24-hour metric is insufficient to satisfy the permit. That is not what the Court said. Instead, the Court concluded only that the Terminal's ability to handle a 10-year, 24-hour storm, *as estimated at the time the permit was issued*, did not provide a complete defense under the permit-shield doctrine at the pleading stage. *See* Mar. 13, 2019 Hr'g Tr. 134:12–135:23, ECF No. 73. The Court reached that conclusion as part of its broader determination that the amended complaint established a "plausible" inference that ExxonMobil was not "consider[ing] the kinds of climate-induced weather events that CLF alleges threaten the terminal," based on "the alleged facts that there have been no changes in the facility after the permit issued." *Id.* at 134:18–19, 135:24–25, 136:12–13. That inference is no longer plausible in light of ExxonMobil's explicit consideration of the FEMA and NOAA estimates in the revised SWPPP.

CLF also asserts that the amendments to the SWPPP cannot moot Count 14 (alleging improper SWPPP certification) because those amendments do not "disclose any of the information

in Exxon's possession concerning severe weather risks to the Terminal." Br. 8. But the SWPPP does disclose such information by identifying locations at the Terminal susceptible to spillage during major storm events. *See* SWPPP § 2.2, at 14 n.**; *see id.* at 13–15. And even were that not sufficient, CLF lacks Article III standing to pursue Count 14 because it does not explain how the failure to disclose that information creates an imminent risk of future harm to its members from unpermitted discharges due to major storm events. *See TransUnion*, 141 S. Ct. at 2214.

CLF separately contends that "Counts 11, 12, and 15 do not rely primarily on the contents of the SWPPP and, therefore, the 2021 SWPPP cannot be material to those counts." Br. 6. ExxonMobil has not argued that the revised SWPPP moots Count 15 (the RCRA claim). But CLF has long treated Counts 6–14 of the amended complaint as dependent on the SWPPP, *see, e.g.*, ECF No. 88, at 4, 5, and the Court has long understood them in that way too. *See, e.g.*, Mar. 13, 2019 Hr'g Tr. 125:16–22 (The Court: "Counts Six to 14 . . . allege that defendant Exxon is violating its permit for the Everett [T]erminal . . . in maintaining the [T]erminal's Storm Water Pollution Prevention Plan.").

In addition, Count 11 unquestionably relies in part "on the contents of the SWPPP." CLF Br. 6. CLF's theory of liability in Count 11 includes that (i) the permit requires the SWPPP to state adequate "spill prevention and response procedures," Am. Compl. ¶ 294; (ii) the SWPPP "rel[ies] solely" on the Spill Prevention Control and Countermeasure Plan (SPCC) and the Facility Response Plan for "[d]etails regarding spill prevention and response," *id.* ¶ 306; and (iii) the SPCC is inadequate, *see id.* ¶¶ 297–305.

In any event, CLF runs headlong into other significant problems by retreating from the SWPPP as the basis for Counts 11 and 12. ExxonMobil previously moved to dismiss Count 11 on the ground that deficiencies in the SPCC "alone or in isolation [are] not a basis for a citizen suit"

under the Clean Water Act. *See* Mar. 13, 2019 Tr. 139:13–21. Agreeing with ExxonMobil on that point, the Court held that CLF could challenge the SPCC only because it was "incorporated in the SWPPP," such that "failure to comply with the SPCC would be a failure to comply with the SWPPP and a failure to comply with the permit." *Id.*; *see* ECF No. 37, at 32–33. But CLF cannot have it both ways. If CLF now takes the position that its SPCC claim does not depend on the SWPPP, then Count 11 fails.

As for Count 12: CLF characterizes that count as based solely on ExxonMobil's alleged "fail[ure] to submit relevant information" in its "permit applications and reports to EPA." Br. 6. But CLF plainly lacks Article III standing to pursue such a claim. The amended complaint never explains how the failure to provide certain information to EPA contributed to the alleged risk of imminent harm to CLF's members from future unpermitted discharges due to major storm events. Any argument to that effect would necessarily rely on an assumption that, upon receipt of the information, EPA would have taken action to eliminate a previously unrecognized alleged risk of harm from the Terminal. But it is "substantially more difficult to establish" standing where the "causal relation between injury and challenged action depends upon the decision of an independent third party." *California*, 141 S. Ct. at 2217 (citations and internal quotation marks omitted). And, in all events, CLF has not actually alleged EPA would have imposed different permit terms or conditions had it received the unspecified information that purportedly should have been submitted. *See* Am. Compl. ¶¶ 315–19.

In short, CLF's new assertion that several of its claims do not rely primarily on the SWPPP, despite the Court (and CLF) long treating them as SWPPP-related, smacks of gamesmanship and, in any event, raises additional reasons why those claims are not viable and must be dismissed.

III. CLF's SWPPP Claims Fail on the Merits Under EPA's Interpretation of the 2021 Multi-Sector General Permit

As ExxonMobil explained in its opening brief (at 24–31), EPA's response to CLF's comments in connection with the 2021 MSGP demonstrates that the requirement to use "good engineering practices" in the Terminal's permit did not require consideration of increased risk of heavy precipitation and flooding due to climate-change-induced severe weather events. CLF's contrary responses are erroneous.

CLF initially argues that the amended complaint "does not rely on any version of the MSGP" and that the 2021 MSGP "cannot and does not alter the specific provisions of the [Terminal's] Permit." Br. 2. That is a strawman. What ExxonMobil has actually argued is precisely what CLF appears to acknowledge (Br. 3): that the 2021 MSGP and EPA's responses to comments provide evidence for interpreting the permit. To be sure, CLF argues that such evidence is relevant only "after the evidentiary record has been developed." *Id.* But it does not explain what facts it could develop in discovery that would override EPA's own authoritative and publicly memorialized interpretation of the relevant terms, to which the Court gives "significant weight." Oct. 5, 2021 Hr'g Tr. 23.

Addressing ExxonMobil's actual argument, CLF contends that it filed comments to address "*proposed* language" that may have "narrowed and undermined the 'good engineering practices' standard," but supposedly was "abandoned" and "significantly modified" in the final 2021 MSGP to account for CLF's concerns. Br. 3–4. But the administrative record itself tells a different story. CLF argued that the "good engineering practice standard" already required facilities to implement control measures to address climate change. CLF Comment 4–5, ECF No. 125-5. If EPA were nevertheless to retain Part 2.1.1.8, CLF urged the agency to make sweeping changes, including the addition of a requirement for control measures to "prevent flood waters from entering the facility

for any reasonably anticipated flooding that might occur during the design life of the facility." *Id.* at 6. CLF argued that EPA would violate the policy against "backsliding" if it did not adopt its proposed changes. *Id.* at 12.

The agency rejected CLF's position. *See* ExxonMobil Supp. Br. 26–27. EPA made clear that the requirements in Part 2.1.1.8 constituted "a new effluent limitation or condition" adopted "for the first time," as "the 2015 MSGP did not include a similar provision." EPA Response to Comments 398, ECF 125-6. EPA added that it "does not agree [with CLF] that permanent, structural control measures are necessary to mitigate risks of pollution from major storm events." *Id.* While EPA did make some changes to Part 2.1.1.8 that addressed CLF's comments, those changes undermine—rather than support—CLF's argument. After all, if CLF were correct that the requirement to use "good engineering practices" already required consideration of the issues raised in its comments, there would have been no need for EPA to amend the draft version of Part 2.1.1.8 to address them.

CLF responds (Br. 4–5) by citing the same excerpts of EPA's responses that CLF raised in the parties' joint report. ExxonMobil already explained why CLF's interpretation of those passages is incorrect, *see* ExxonMobil Supp. Br. 29–31, and CLF offers nothing new to the contrary. Indeed, CLF acknowledged at the October 5, 2021 court conference that it could not explain EPA's express disagreement with the position CLF advanced in its comment, including EPA's confirmation that Part 2.1.1.8 imposed new requirements. Hr'g Tr. 52:1–2 (responding to the Court's question about EPA's response to CLF's comment by stating, "honestly, I don't know what EPA means there").

In sum, EPA's response to CLF's comments in connection with the 2021 MSGP squarely and unambiguously demonstrates that the "good engineering practices" requirement in the

Terminal's permit did not require ExxonMobil to consider in its SWPPP the climate-change-related risks alleged in the amended complaint. CLF's SWPPP claims would thus fail on the merits even if, contrary to fact and law, (i) CLF had Article III standing to pursue them, and (ii) those claims were not moot.

IV. The Court May Consider the 2021 MSGP and the Revised SWPPP

CLF does not appear to dispute that the Court may consider the 2021 MSGP and the revised SWPPP when considering whether the SWPPP claims are moot. *See* ExxonMobil Supp. Br. 31–33. Nor does CLF contest that it was previously appropriate for the Court to consider extrinsic evidence when assessing the merits of the SWPPP claims. *See* CLF Supp. Br. 19. Instead, CLF argues that the Court should not consider "further" extrinsic evidence until discovery has been completed. *See id.* at 18–22. CLF is again mistaken.

The "construction of [an NPDES] permit is a matter of law" for courts to decide. *United States* v. *Weitzenhoff*, 35 F.3d 1275, 1288 (9th Cir. 1993); *accord, e.g.*, *Am. Canoe Ass'n Inc.* v. *D.C. Water & Sewer Auth.*, 306 F. Supp. 2d 30, 41 (D.D.C. 2004); *Jones Creek Invs., LLC* v. *Columbia County*, 98 F. Supp. 3d 1279, 1299 (S.D. Ga. 2015); *Nat. Res. Def. Council, Inc.* v. *Texaco Ref. & Mktg., Inc.*, 20 F. Supp. 2d 700, 709 (D. Del. 1998), *aff'd*, 182 F.3d 904 (3d Cir. 1999); *Williams Pipe Line Co.* v. *Bayer Corp.*, 964 F. Supp. 1300, 1325 (S.D. Iowa 1997). Courts interpret NPDES permits using principles of contract law. *See, e.g.*, *Tenn. Clean Water Network* v. *Tenn. Valley Auth.*, 905 F.3d 436, 446 (6th Cir. 2018); *Piney Run Pres. Ass'n* v. *Cty. Comm'rs of Carroll Cty.*, 268 F.3d 255, 269 (4th Cir. 2001). Accordingly, if the language of the permit, "considered in light of the structure of the permit as a whole, is plain and capable of legal construction, the language alone must determine the permit's meaning." ECF No. 106, at 5 (citation and quotation marks omitted). But if "the permit's language is ambiguous," the court "may turn to extrinsic evidence to interpret the permit's terms." *Id.* (brackets omitted).

The purpose of reviewing extrinsic evidence in this context is to determine "a reasonable construction" of the permit "in light of the intentions of the parties at the time of [the permit's] formation." *PhoneDOCTORx, LLC* v. *Healthbridge Mgmt., Inc.*, 58 F. Supp. 3d 152, 160 (D. Mass. 2014). While extrinsic evidence can raise questions for determination by the factfinder, it does not where an "alternative reading is inherently unreasonable when placed in context." *McAdams* v. *Mass. Mut. Life Ins. Co.*, 391 F.3d 287, 299 (1st Cir. 2004). That principle applies with special force to extrinsic evidence of EPA's interpretation of language in an NPDES permit, because EPA's "reasonable interpretation of the NPDES permit" is entitled to "substantial deference." *Russian River Watershed Prot. Comm.* v. *City of Santa Rosa*, 142 F.3d 1136, 1141 (9th Cir. 1998); *see Nat. Res. Def. Council, Inc.* v. *County of Los Angeles*, 725 F.3d 1194, 1208 (9th Cir. 2013).

Under those principles, the Court should consider EPA's comments interpreting the 2021 MSGP and dismiss CLF's SWPPP claims on the merits. The Court previously relied on guidance from the U.S. Army Corps of Engineers to determine that the Terminal's permit is ambiguous as to what constitutes "good engineering practices." *See* Mar. 13, 2019 Tr. 111:14–22, 133:3–13. But that evidence was merely a proxy for determining EPA's intentions "at the time of [the permit's] formation." *Armstrong* v. *White Winston Select Asset Funds, LLC*, Civ. No. 16-10666, 2020 WL 10316643, at *10 (D. Mass. 2020). The Court now has actual evidence of EPA's intent, which is directly contrary to CLF's preferred interpretation. *See* ExxonMobil Supp. Br. 27–31. CLF's interpretation of the phrase "good engineering practices" in the Terminal's permit is thus "inherently unreasonable" when placed in the relevant context, *McAdams*, 391 F.3d at 299. The Court therefore should not hesitate to dismiss CLF's SWPPP claims based on EPA's authoritative interpretation of the 2021 MSGP.

The authorities relied on by CLF are not to the contrary. In *City of New Bedford* v. *AVX Corp.*, Civ. No. 15-10242, 2015 WL 13697608 (D. Mass. Aug. 27, 2015), the court determined on a motion to dismiss that an environmental consent decree was ambiguous and could only be "resolved by factfinding at trial." *Id.* at *6. But there, the extrinsic evidence of EPA's interpretation of a different but related consent decree showed that the plaintiff's interpretation was *reasonable*, permitting the case to proceed past the pleading stage. *See id.* Here, the extrinsic evidence of EPA's interpretation of the MSGP establishes that CLF's interpretation of the Terminal's permit is *unreasonable*. *See* ExxonMobil Supp. Br. 27–31. CLF's claims should not be permitted to proceed under those circumstances.

CLF's reliance on *Conservation Law Foundation, Inc.* v. *Pease Development Authority*, Civ. No. 16-493, 2017 WL 4310997 (D.N.H. Sept. 26, 2017), is similarly misplaced. The extrinsic evidence at issue in *Pease* was not EPA's authoritative interpretation of terms that appear in the underlying NPDES permit; instead, the extrinsic evidence concerned "questions well beyond the factual allegations in CLF's complaint." *Id.* at *16–17. That is a far cry from the situation here, where the relevant extrinsic evidence goes directly to the proper interpretation of the disputed provision, is subject to judicial notice, and does not require the Court to take any new facts on faith. *See* ExxonMobil Supp. Br. 31–33.

V. Anticipated Discovery and Discovery Schedules

CLF's supplemental brief only reinforces the importance of phased and bifurcated discovery if all of CLF's claims remain. Only a sliver of the expansive discovery CLF proposes will be necessary if ExxonMobil's interpretation of the disputed permit terms is correct. For example, CLF's proposed categories of fact discovery include multiple topics that become relevant only if the Court adopts CLF's novel interpretation of the permit, including the categories of "Exxon's knowledge of climate change risks to infrastructure" and "Exxon's policies concerning

the preparedness of its infrastructure for climate change." CLF Supp. Br. 23. It makes no sense to take the expansive discovery CLF seeks when limited discovery into the few disputed terms of the permit could resolve the case.

Indeed, CLF reveals its cards by opposing phased and bifurcated discovery while at the same time opposing consideration of extrinsic evidence to interpret the permit until summary judgment. *See* Br. 18–22. Acceptance of those combined arguments would postpone adjudication of the meaning of disputed permit terms until the parties have completed *all* fact and expert discovery, including all discovery related to liability and potential remedies. CLF is thus transparently seeking to delay interpretation of the permit as long as possible while imposing the maximum possible burden on ExxonMobil in the interim.

In an effort to make its proposal seem more reasonable, CLF proposes (Br. 23) that all fact discovery be completed in under five months. But CLF plainly knows that timeframe is not remotely realistic. In fact, in CLF's similar lawsuit against Shell in Rhode Island federal court, the parties proposed, and the court initially provided, nearly 13 months for fact discovery following submission of initial disclosures. *See* ECF No. 61-1, at 2–3, *Conservation Law Found., Inc.* v. *Shell Oil Prods. US*, Civ. No. 17-396, (D.R.I.). But even that was not enough: the parties later requested "additional time to complete factual discovery." ECF No. 63, at 2, *Shell Oil Products*. Given that experience, CLF's claim that the parties can complete fact discovery here in less than five months is not credible—especially given that CLF requests twice the number of fact depositions, twice the number of requests for production, twice the number of requests for admission, and 15 more interrogatories than permitted by Local Rule 26.1(c). *See* ECF No. 115, at 45. If all of CLF's claims remain, the Court should adopt ExxonMobil's proposed discovery plan and reject CLF's unrealistic proposal.

* * * * *

Counts 6–14 should be dismissed for lack of Article III standing, mootness, and failure to state a claim. Count 15 should be dismissed for lack of Article III standing. If any claims remain, discovery should be limited in the first instance to issues of permit interpretation, which have the potential to resolve CLF's claims in their entirety.

Respectfully submitted this 19th day of November 2021.

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CERTIFICATE OF SERVICE

I, Deborah E. Barnard, hereby certify that, in accordance with Local Rule 5.2(b), the foregoing document was filed through the ECF system on November 19, 2021, and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ *Deborah E. Barnard*
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